



555 California Street  
12th Floor  
San Francisco, CA 94104

415.875.2300  
Fenwick.com

Todd R. Gregorian  
tgregorian@fenwick.com | 415.875.2402

June 12, 2023

**Filed Electronically VIA ECF**

Molly C. Dwyer, Clerk of the Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box. 193939  
San Francisco, CA 94119-3939

Re: Yuga Labs, Inc. v. Ripps, et al., Case No. 22-56199

Yuga Labs responds to Defendants' notice under Rule 28(j) concerning *Jack Daniel's Properties, Inc. v. VIP Products LLC*, No. 22-148, 599 U.S. \_\_ (June 8, 2023).

In *Jack Daniel's*, the Supreme Court held that the *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) test concerning artistic uses of a mark does not apply "when an alleged infringer uses a trademark . . . as a designation of source for the infringer's own goods." Ex. A at 10. Instead, *Rogers* is "a cabined doctrine" that applies "only to cases involving 'non-trademark uses,'" *i.e.*, "cases in which 'the defendant has used the mark' at issue in a 'non-source-identifying way.'" *Id.* at 13. The result does not change even if "the use of a mark has other expressive content—*i.e.*, because it conveys some message on top of source." *Id.* at 15.

Defendants' argument is precisely the application of *Rogers* foreclosed by *Jack Daniel's*. Defendants concede that they used Yuga Labs' trademarks (*e.g.*, "BORED APE YACHT CLUB," "BAYC") to market their own products (named "Ryder Ripps Bored Ape Yacht Club" and "RR/BAYC"). OB10, 34; *see also, e.g.*, Reply at 23 (acknowledging the products "on the OpenSea NFT marketplace were labeled as part of the RR/BAYC collection"). Under *Jack Daniel's*, the *Rogers* test does not apply; it is irrelevant that Defendants claim that "context" shows that they sold products under Yuga Labs' marks as an artistic statement or means of "provocation." *See* OB27.

June 12, 2023

Page 2

Sincerely,

FENWICK & WEST LLP

*/s/ Todd R. Gregorian*

Todd R. Gregorian

cc: All Counsel of Record